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IN THE

Supreme Court of the United States

CHARTER COMMUNICATIONS, INC.,
CHARTER COMMUNICATIONS PROPERTIES, LLC,
AND PAUL G. ALLEN,
PETITIONERS,

v.

COUNTY OF SANTA CRUZ, CALIFORNIA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Far from providing a good reason for denying the petition for certiorari, the opposition brief filed by Respondent County of Santa Cruz, California (the "County") only serves to highlight the very reasons why review by this Court is necessary.

The County argues for an expansive role for local franchising authorities in regulating cable franchisees, in stark contrast with the more circumscribed role that Charter contends is mandated by national cable policy. Despite its best efforts, the County is unsuccessful in papering over the conflicts in the lower courts on this very issue. This Court should grant the writ to resolve this fundamental disagreement. The County also is unable to identify a clear waiver by Petitioners of their First Amendment rights, and the County's defense of an implicit waiver of First Amendment rights only underscores the flawed and problematic nature of the Ninth Circuit's decision. In addition, the County's reliance on California state law for its argument that it was engaged in "legislative acts" conflicts with the uniform national policy inherent in the Cable Act[1] and with the decisions of other circuits. As is apparent from its opposition brief, the County wants local governments to have far-reaching powers to evaluate corporate transactions in the cable industry and to extract unlawful concessions from cable systems without any meaningful review by the federal courts. The writ should be granted to review and reverse the dangerous precedent established by the court of appeals' decision.

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1 The "Cable Act" refers to the Cable Communications Policy Act of 1984 and subsequent amendments in 1992 and 1996. (Pet. at 1.)

A. The Substantial Deference Standard Adopted By The Ninth Circuit Conflicts With The Uniform National Policy Established By Congress

1. This case presents competing concepts of the role of local governments in the cable context. As Charter discussed in the petition (Pet. at 9), Congress intended the Cable Act to "establish a national policy concerning cable communications." 47 U.S.C. § 521(1). The role of local franchising authorities was restricted in this national scheme, thereby "minimiz[ing] unnecessary regulation that would impose an undue economic burden on cable systems." *Id.* at § 521(6). The preeminence of national cable policy and the concomitant limitations on the regulatory actions of local governments has been recognized on numerous occasions by this Court and the lower courts. (Pet. at 9-10, 15-16.)

In arguing for broad deference to local franchising authorities, the County sets forth a very different view of the role of local governments under the Cable Act. (Br. in Opp. at 7-13.) According to the County, the goal of Congress in passing the Cable Act was simply to clarify the existing system of local, state, and federal regulation of cable television and not to restrict local authority. (*Id.* at 7.) The County apparently sees few, if any, limits on a local government's role in the approval of transfers or the franchising process in general.

This Court should grant the writ in this case to resolve this important issue concerning the deference due local governments in the cable context. Consistent with the Cable Act and the case law, *see, e.g.*, *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984); *City of New York v. FCC*, 486 U.S. 57 (1988), this Court should reject the standard of substantial deference to local governments promulgated by the Ninth

Circuit's opinion below as inconsistent with the national policy established by Congress.[2]

2. The County also presents a very different version of the facts. According to the County, it sought only *"requests for information"* and its "rate freeze and payment proposals were not *demands*." (Br. in Opp. at 1, 6 (italics in original).) The County further notes, in an argument placed in italics and boldface, that the actual language of the County Board of Supervisors' resolution did not include mention of the rate freeze or $500,000 payment. (*Id.* at 5.)

The factual contentions by the County were not accepted by the federal district court. Rather, after an eight-day trial, the district court found that

> [t]he denial was based upon plaintiffs' refusal to comply with the County's information requests, its demand for an independent financial study to be financed by Charter, its demand for cash payment of $500,000 and its demand for a further rate freeze.

(App. at 42a-43a.) The district court then examined each of these bases relied upon by the County, including its information requests, and concluded that each of the County's

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[2] The significance of this key issue about the deference due local franchising authorities is reflected by the amicus brief in support of the petition filed by the National Cable & Telecommunications Association, the American Cable Association, and the California Cable and Telecommunications Association, as well as the amicus briefs filed in the court below by the National League of Cities and a host of local governments.

grounds violated the Cable Act. (App. at 44a-71a; *see also* Pet. at 11-15.)[3]

The discrepancy between the County's factual recitation and the findings and conclusions of the district court lies at the heart of the problem with the Ninth Circuit's deferential standard. The court of appeals considered the County's pretextual justifications on their face. Based on its extreme deference, the Ninth Circuit refused to scrutinize the County's actions in any meaningful way, "see[ing] no reason for either the district court or this panel to reach the issues regarding the Cable Act." (App. at 3a n.3.) Yet, this approach eliminates any effective judicial review. The result is an invitation to the numerous local franchising authorities to use pretextual rationales to extract unlawful concessions in return for consents to transfer, contrary to the Cable Act and FCC regulations.

3. The County also argues that there is no confusion in the case law regarding the application of deference in the cable context, positing a supposed distinction between "issues of preemption or statutory interpretation" and those involving "discretionary actions." (Br. in Opp. at 10,

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[3] As the FCC has clearly stated,

> in exercising their transfer jurisdiction, franchising authorities may not seek to circumvent the Commission's authority over rate regulation, franchise fees or other matters.

In re Matter of Implementation of Sections 11 & 13 of the Cable Television Consumer Protection Act of 1992, 8 F.C.C.R. 682, ¶ 39 n.38 (1993) (hereinafter "1993 Order"). Here, the district court held that the County "tried to do exactly what Footnote 38 and federal law prohibited." (App. at 71a.)

14-15.)[4] The County, however, cites to no cases explaining or discussing the rationale for this so-called distinction.[5] The County created this theory of "preemption and statutory" versus "discretionary" out of whole cloth. The County never describes what constitutes a "discretionary act" rather than a "statutory provision," given that in this case the County acted through a formal resolution of its Board of Supervisors. The County's argument also would turn the concept of deference on its head. The County would have a municipality receive *less* deference when it engages in public policymaking in passing official legislation and *more* deference when it is undertaking informal (and amorphous) "discretionary actions."

The distinction the County makes between "statutory provisions" and "discretionary actions" also underscores the internal inconsistency of the County's position. The County argues that it is entitled to broad deference because its denial of consent to Charter's transfer was a "discretionary action" and not "a statutory provision." (Br. in Opp. at 15.) Yet, later in its opposition (*id.* at 19-25), the County asserts that it is entitled to deference because it was acting "legislatively." These two positions cannot be reconciled.

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4 "Because the courts there were reviewing discretionary actions, rather than statutory provisions, the franchising authorities' decisions were entitled to deference." (Br. in Opp. at 15.)

5 In fact, *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356 (4th Cir.2001); *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000); *Cable Alabama Corp. v. City of Huntsville*, 768 F. Supp. 1484 (N.D. Ala. 1991), all arise from the same transfer context as this case. In each instance, the local government argued for deference, yet the courts engaged in the analysis of federal cable law the Ninth Circuit assiduously avoided here.

The case law does not recognize the distinctions imagined by the County. Rather, in numerous cases, including those addressing transfers of control and other comparable circumstances, courts have applied the Cable Act without any of the special deference to the local franchising authority accorded by the Ninth Circuit here. This Court should grant the petition to address these conflicting decisions on an important issue of national cable policy.

B. The Court of Appeals' First Amendment Analysis Is Flawed And Threatens The Rights Of All Cable Franchisees

1. The County defends the Ninth Circuit's denial of Charter's First Amendment challenge by first arguing that the Ninth Circuit "applied" *United States v. O'Brien*, 391 U.S. 367 (1968), and concluded that the County "passed" *O'Brien*'s First Amendment test. (Br. in Opp. at 15-16.) Yet, nowhere in the opinion does the court of appeals cite to or mention *O'Brien*. Nor does the Ninth Circuit ever attempt to evaluate whether the County's actions placed an "incidental burden" on the First Amendment rights of Petitioners that was "no greater than is essential" to the furtherance of the County's interest, as required under *O'Brien*. *See* 391 U.S. at 377. The County's assertion that the Ninth Circuit applied *O'Brien* is, quite simply, disingenuous.[6]

2. Not surprisingly, the County's brief does not identify any clear statement in the franchise agreement

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[6] In addition, the County maintains that *O'Brien* is satisfied since the court of appeals refers to a "legitimate governmental interest." (Br. in Opp. at 16.) Yet, this is not the equivalent of the "*important* or *substantial* governmental interest" required by *O'Brien*. 391 U.S. at 377 (emphasis added). Also, as noted above, there is no analysis of whether the restriction on First Amendment freedoms is "no greater than is essential."

whereby Charter waived its First Amendment right to challenge the County's actions. As the County well knows, no such waiver ever took place. The County, instead, appears to argue that a waiver can be implied from the agreement because Charter was a "sophisticated party." (Br. in Opp. at 18.) This type of implicit waiver is not permitted under this Court's First Amendment jurisprudence, which requires intelligent, knowing and clear waivers of fundamental rights.[7] (Pet. at 18-20.) In particular, no waiver of First Amendment rights can be found against Petitioner Paul Allen, who was not a party to the original franchising agreement between Charter and the County.

C. The County's Denial Of Consent To Transfer Was Not A "Legislative Act" When It Acted Pursuant To Its Contractual Obligations

1. In arguing that its denial of consent constituted a "legislative act" due substantial deference, the County relies on a welter of California state court decisions. (Br. in Opp. at 19-25.) The County apparently maintains that California law allows municipalities broad deference and therefore condones the County's flouting of its contractual obligations. Yet, surely local or state law does not control the amount of deference due the acts of the local government under the Cable Act. Where, as here, the cable operator challenges the actions of the local franchising authority on the grounds that it violates the Cable Act and First Amendment, the standard of deference cannot be dependent on the local law -- a contrary

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[7] The court of appeals' conclusion that franchise agreements constitute waivers is especially troubling in light of the unequal power relationships, with local governments having disproportionate leverage as a result of their monopoly on cable access.

result would devastate the uniform national policy established by Congress.

2. The County attempts to blur the different circumstances of transfers with those of grants and renewals of franchises. (Br. in Opp. at 19-21.) The County entered into a contract with Charter that addressed the issue of consent to transfer. The County obligated itself to abide by certain terms in connection with any such transfer by Charter. These contractual obligations make the County's actions relating to transfers markedly different than the granting or renewal of franchises where the County acts without any such contractual commitments. In light of the binding contractual provisions, transfers involve the County acting in its administrative or executive capacity, rather than engaging in unfettered legislative policymaking. (Pet. at 22-27.)

3. The County's large collection of California state cases also does not change the fact that the Ninth Circuit's decision conflicts with numerous decisions in other circuits. (Pet. at 24-27.) This Court should grant this petition to resolve the conflict among the appeals courts and reverse the Ninth Circuit.

D. The Issues In This Petition Are Important For The Cable Industry And Others

1. The real agenda of the local franchising authorities is betrayed in footnote 9 of the County's brief. In that footnote, the County questions the financial underpinnings of not just the Charter/Paul Allen transaction but also the AT&T/TCI merger. (Br. in Opp. at 13 n.9.) As that footnote implicitly acknowledges, each of the thousands of local franchising authorities would like broad authority to conduct wide-ranging examinations and negotiations relating to any and all cable system transactions. Ignoring the limitations inherent in the 120-day rule and the FCC's 1993

Order (*see* Pet. at 11-12), each local franchising authority wants to engage in extensive investigations of the detailed financial terms of the AT&T/TCI merger and other major transactions. The obvious result of such a regime would be to threaten the viability of future transactions in the cable industry, hindering the industry consolidation and flow of capital needed to keep pace with technology.

2. More ominously, the deferential standard adopted by the Ninth Circuit allows local governments to extract unlawful concessions from cable systems with impunity. By turning a blind eye to the reality of the situation, and by scolding the district court for going beyond a superficial review, the court of appeals is virtually encouraging local franchising authorities to use pretextual "problems" to obtain *quid pro quos* not permitted by the Cable Act and the FCC regulations. This Court should grant the petition because of the potential impact of this case on the cable industry and other government contractors.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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